WONG CHOON FOR

v.

LIM CHEE HOOI & ORS

HIGH COURT MALAYA, TEMERLOH
RAMLY ALI JC
[CIVIL APPEAL NO: 11-36-2000]
19 OCTOBER 2001

CIVIL PROCEDURE: *Affidavits - Jurat - Non-compliance with rules - Jurat contravening O. 25 r. 22(7) & (8) of the Subordinate Courts Rules 1980 - Whether affidavit rendered invalid - Subordinate Courts Rules 1980, O. 25 rr. 22(7) & (8), 25*

LANDLORD & TENANT: *Rent - Arrears - Whether tenant in arrears - Whether landlord justified in applying for writ of distress - Control of Rent (Repeal) Act 1997, s. 8*

LANDLORD & TENANT: *Rent - Distress - Application and issuance of writ of distress - Whether irregular - Whether ought to be set aside*

This was the appellant's appeal against the learned magistrate's decision allowing the preliminary objections made by the respondents and consequently dismissing the appellant's application. The appellant alleged that the learned magistrate had erred in law when he allowed the respondents' preliminary objections that the appellant's affidavit in support of the application was defective on the ground that the jurat to the said affidavit failed to comply with the requirements under O. 25 r. 22(7) and (8) of the Subordinate Courts Rules 1980 ('SCR') in that the jurat should have been as in form 71(d), not as in form 71(c). He further argued that the learned magistrate was also wrong in law in dismissing his application without hearing and considering its merits.

Held:

[1] The deponent in this case was illiterate as far as Bahasa Malaysia was concerned and since the affidavit was affirmed in Bahasa Malaysia, the deponent must be considered illiterate. Therefore, the proper format to be used was form 71(c), and not form 71(d). The so-called "non-compliance" with the SCR as raised by the respondents in their preliminary objections was not serious, and at most, could only be considered a mere irregularity which could be cured; hence the said affidavit could be used in evidence under O. 25 r. 25 of the SCR to support the appellant's application. (pp 563 b-d & 564 d-f)

[2] The appellant was not in arrears as far as the rental for the transitional period as he had tendered the said rental to the previous owner of the premises, and at this point of time, the appellant had no knowledge about the change of ownership as he had not received the two earlier letters sent by the first respondent and the previous owner. Thus, the respondents could not use this issue to apply for a writ of distress against the appellant. Furthermore, the respondents' reliance on the provisions of the Control of Rent (Repeal) Act 1997 ('the Act') was also unfounded as a landlord's right under s. 8 of the Act only arises in the event of non-payment or arrears in payment of rental during the transitional period.
(pp 566 e-f & 571 e-f)

[3] In this instance, the new rental was unilaterally fixed by the respondents and not effectively communicated to the appellant. The appellant had no knowledge about it and had never agreed to the new rental, therefore there was no new tenancy agreement. In order to support a claim for increased rental or to justify the distress thereof, the respondents must show that the appellant had agreed to pay such increased rental. Hence, the respondents had not proved that the appellant's rental was in arrears for four months, and on this ground, there was no justification for the application and issuance of a writ of distress. (pp 569 d-f & 570 b-c)

[Appeal allowed.]

Case(s) referred to:
Chong Fong Kwee v. Kong Gim Ham [1959] MLJ 75 ***(foll)***
Corbett v. Taylor [1864] 23 UCR 454 ***(refd)***
Government of Malaysia v. Zainal Hashim [1977] 2 MLJ 254 ***(foll)***
Jenaboo & Anor v. Vytilingum [1885] 4 KY 78 ***(foll)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

Legislation referred to:
Control Of Rent (Repeal) Act 1997, ss. 3, 5(1), 6(1), (2), 8(1), (2), 11(1), (2), (3)(a)
Courts of Judicature Act 1964, ss. 29, 69(1), (4), (5)
Distress Act 1951, ss. 2, 4, 5(1), 7
Subordinate Courts Rules 1980, O. 2 r. 1, O. 25 rr. 22(4), (7), (8), 24, 25, form 71(a), (b), (c), (d)

For the appellant - Tan Hwee Hwee; T/n Shui-Tai
For the respondents - K. Doraisamy; T/n Loke, Chew & Zainal

Reported by Suresh Nathan

JUDGMENT

Ramly Ali JC:

This is an appeal by the appellant/defendant against the decision of the learned magistrate, Bentong made on 2 June 2000 allowing the preliminary objections made by the respondents/plaintiffs and consequently dismissing the appellant's application dated 12 April 2000 with costs. The appellant argued that the learned magistrate was wrong in law when he allowed the respondents' preliminary objections that the appellant's affidavits in support of the application sworn on 4 April 2000 and 8 May 2000 were defective for non-compliance with O. 25 r. 22(4), (7) and (8) of the Subordinate Courts Rules 1980 (SCR). He further argued that the learned magistrate was also wrong in law in dismissing his application dated 12 April 2000 without hearing and considering its merits.

Facts Of The Case

At all material times, the respondents were owners of the premises at No: 100, Jalan Loke Yew, Bentong, Pahang, while the appellant was the tenant in the said premises. The appellant had rented the premises since 1947 from one Wong Sow Yoon (P) (deceased) for a rental of RM58 per month. In June 1995, the said premises was sold to one Tui Tuck Mun. The tenancy was continued and the same rental of RM58 was paid by the appellant to the said Tui Tuck Mun. Sometime in October 1999, the said premises was sold to the respondents and the appellant was advised by the said Tui Tuck Mun *vide* his letter to the appellant dated 13 October 1999 to forward his monthly rental to the respondents as the new owners with effect from that month. (The appellant denied having received this letter. There's no acknowledgment of receipt produced to show that the appellant had received the letter).

On 1 October 1999, the first respondent (Lim Chee Hooi) claimed to have sent a letter to the appellant, giving him notice under ss. 11(1), 11(2) and 11(3)(a) of the Control of Rent (Repeal) Act 1997 requiring the appellant to vacate the said premises on or before 31 December 1999. The letter also indicated that if the appellant wished to continue the tenancy of the said premises, he was advised to come to the first respondent's office to discuss the matter. The first respondent also stressed in the letter that in any event if the appellant continue to occupy the said premises after 31 December 1999, the appellant has to pay rental of RM1,500 per month from 1 January 2000 until delivery of vacant possession. (Again, the appellant denied having received this letter. It was not sent by way of AR Registered. There is no acknowledgment of receipt produced to show that the appellant had received the letter).

On 3 December 1999, the first respondent once again sent another letter to the appellant requesting the appellant to vacate the said premises on or before 31 December 1999. Once again, the appellant was advised to discuss the matter if he wished to continue the tenancy after 31 December 1999. This is the first letter the appellant claimed to have received from the respondents.

As for the monthly rental, the appellant was paying the rental regularly to Tui Tuck Mun since July 1995 up to December 1999. For the month of January 2000, the same amount of rental was also sent to the said Tui Tuck Mun. For the months of February 2000 and March 2000, the rental was paid to the first respondent. No further correspondence or communication between the respondents and the appellant on this matter. On 28 February 2000 the respondents had, through their solicitors, applied for a writ of distress to be issued by the Bentong Magistrate Court, *vide* Permohonan Pemula Distress No: 74-01-2000 on the ground that the appellant has failed to pay the monthly rental to the said premises for four months ie, RM58 each for November 1999 and December 1999 and RM1,500 each for January 2000 and February 2000. The total amounts of rental alleged to be due and payable under the said application was RM3,116.

The said application was supported by the affidavit of the first respondent affirmed and sworn on 23 February 2000. An order allowing the application was granted by the learned magistrate on 29 February 2000 and a writ of distress was issued on 1 March 2000. Consequently on 10 March 2000 the court bailiff seized the movable properties of the appellant in the said premises and a notice of inventory was prepared. The said properties were sold by way of public auction on 23 March 2000.

In the meantime, on 11 March 2000, the appellant lodged a police report when he discovered that the said premises was sealed and locked.

On 12 April 2000 the appellant filed an application in the Magistrate Court Bentong to set aside and cancel the said writ of distress. This application was supported by the appellant's affidavit affirmed and sworn on 4 April 2000. When this application came up for hearing on 2 June 2000, the counsel for the respondents raised preliminary objection to the effect that the appellant's affidavit dated 4 April 2000 was defective on the grounds that:

i. the jurat to the said affidavit was not signed by a commissioner for oaths; and

ii. the jurat to the said affidavit failed to comply with the requirements under O. 25 r. 22(7) and (8) of the SCR 1980.

The learned magistrate allowed the said preliminary objections by the respondents' counsel and rejected the appellant's affidavit-in-support of the application. As the appellant's application was without any supporting affidavit, the learned magistrate consequently dismissed the application. The appellant is not satisfied with the said order. Hence the appeal.

Civil Appeals To Be By Way Of Re-Hearing

It is trite law that all civil appeals from a subordinate court shall be by way of rehearing. This court, in exercising its appellate jurisdiction has the power to give any judgment and to make any order which ought to have been made and to make such further or other order as the court may think fit. In other words, this court is entitled to make such order as could have been made if the case had been heard at the date on which the appeal was heard. For that purpose, this court will consider the case in toto (as a whole) and to make such necessary order for an early disposal of the matter.

Section 29 of the Courts of Judicature Act 1964, clearly says:

> All civil appeals from a subordinate court shall be by way of re-hearing, and the High Court shall have the like powers and jurisdiction on the hearing of appeals as the Court of Appeal has on the hearing of the appeals from the High Court.

In *Government of Malaysia v. Zainal Hashim* [1977] 2 MLJ 254 the Federal Court held (at p. 256):

> Appeals to this court are by way of rehearing and we may give any judgment make any order which ought to have been given or made by the trial court and make such further or other orders as the case requires, section 69(1) and (4) of the Courts of Judicature Act No. 7 of 1964. This means, on the authority of *Quilter v. Mapleson* [1881 - 2] 9 QBD 672 that we are authorised to make such order on this appeal as ought to be made according to the law as it stands not at the time of trial, but at the time of this appeal.

Sections 69(1), (4) and (5) of the Courts of Judicature Act 1964 also provides:

> (i) Appeals to the Court of Appeal shall be by way of rehearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.
>
> (4) The Court of Appeal may draw inferences of fact and give any judgment, and make any order which ought to have been given or made and make such further or other orders as the case requires.
>
> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also

be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision.

Based on the above authorities, this court will re-hear the whole case, including the appellant's application to set aside or to cancel the writ of distress as well as the issues on preliminary objections raised by the parties, with the view of an early disposal of the case. All the relevant affidavits and submissions by both parties are before the court. In fact both counsels for the appellant as well as the respondents have agreed and submitted that this court should rehear the whole case and to give order accordingly.

Preliminary Objections

When the appellants' application came up for hearing at the magistrate court on 2 June 2000, the counsel for the respondents raised preliminary objections to the effect that the appellant's affidavit in support of the application dated 4 April 2000 was defective on the grounds that:

i. the jurat to the said affidavit was not signed by a commissioner for oaths; and

ii. the jurat to the said affidavit failed to comply with the requirements under O. 25 r. 22(7) and (8) of the SCR 1980 in the sense that the jurat should have been as in Form 71(d), not as in Form 71(c).

The respondents' counsel submitted that the affidavit has no jurat at all and there is no indication to show that the affidavit was read and explained to the deponent before he signed the affidavit.

The relevant portion of the jurat to the said affidavit is reproduced below:

Bagi affidavit oleh seseorang yang tidak faham Bahasa Malaysia

Diikrarkan oleh,
WONG CHOON FOR)
pada 04 APR 2000)
di Kuala Lumpur)

Saya setelah dengan sebenarnya, sejelasnya)
dan seterusnya membacakan kandungan afidavit)
di atas dan menerangkan jenis dan kesan eksibit-)
eksibit yang disebutkan di dalamnya kepada deponen)
tersebut yang nampaknya cukup faham dengannya)
dan yang menurunkan tandanya pada afidavit itu)
didalam kehadiran saya.)

a tt

... Cop
TEONG KIAN MENG
Jurubahasa Mahkamah Bersara
(Tingkatan Tertinggi)

Dihadapan saya,
t.t
TEONG KIAN MENG
Commissioner For Oaths
b Lot 138, Tingkat Satu,
Wisma HLA, Jln Raja Chulan
50200 Kuala Lumpur

I have scrutinised the said jurat and found that the jurat was signed by the deponent Wong Choon For before a commissioner for oaths, Teong Kian Meng
c who at the same time acted as an interpreter. The said Teong Kian Meng had signed twice in the jurat: one above his rubber stamps as 'Jurubahasa Mahkamah Bersara (Tingkatan Tertinggi)' and the other one inside his rubber stamp as a commissioner for oaths. On this finding alone I am satisfied that the said affidavit was in accordance with the relevant requirement that a
d commissioner for oaths must sign the jurat. On top of that, the same Teong Kian Meng, has also signed as "Jurubahasa Mahkamah Bersara (Tingkatan Kanan)".

Eventhough the relevant Form 71 of the SCR 1980, does not require the interpreter to sign the jurat, I am of the view that the presence of the said
e signature does not in any way cause the affidavit to be defective. It was not misleading. No one is prejudiced because of the 'extra' signature. The fact still remains that, as a commissioner for oaths, the said Teong Kian Meng has duly signed the appropriate column in the said jurat.

f The respondents' counsel also argued that the said jurat should have used Form 71(d), instead of Form 71(c), because the deponent in this case does not understand Bahasa Malaysia. To him, Form 71(c) is not appropriate because it is meant for a deponent who is illiterate or blind.

It is not disputed that the deponent is a Chinese who could not understand
g Bahasa Malaysia. The opening sentence to the said jurat clearly shows that the deponent does not understand Bahasa Malaysia. Form 71(c) is for an affidavit by an illiterate or blind person. For a better understanding of the contents of Form 71(c), it is necessary to reproduce the said form:

h (c) To an affidavit by an illiterate or blind person: ... sworn (or affirmed) on the... day of ... at ... I, having truly, distinctly and audibly read over the contents of the above affidavit (add if exhibits are referred to in the affidavit 'and explained the nature and effect of the exhibits therein referred to') to the said deponent who seemed perfectly to understand the same and who made his mark thereto in my presence (Through the
i interpretation of ...)

Before me ...
Commissioner for Oaths

In the SCR 1980, the word 'illiterate' is not defined or explained. It is therefore necessary to refer to the natural and ordinary meaning of the word as found in the dictionary. In *Chamber Concise Dictionary*, the word 'illiterate' means "unable to read". While in *Collins Pocket Dictionary*, it means 'not knowing how to read or write'. In *Shorter Oxford English Dictionary*, the same word means 'one who is unable to read'. In *Oxford Advanced Learner's Dictionary*, 'illiterate' means (1) not able to read or write; (2) ignorant in a particular field. In the context of the affidavit in Bahasa Malaysia as affirmed by the deponent, it must mean that the deponent is unable to read or write or understand Bahasa Malaysia. Thus, the deponent in this case is said to be illiterate as far as Bahasa Malaysia is concerned. He may be literate in Chinese character, but for the purpose of the present affidavit which was affirmed in Bahasa Malaysia, the deponent must be considered as an illiterate. Therefore the proper format to be used is as in Form 71(c), not as in Form 71(d) as suggested by the respondents' counsel. Since the deponent cannot understand Bahasa Malaysia, the contents of the affidavit must be interpreted to him in the language that he understands, by a competent interpreter, and thereafter that part of the form which read: "(Through the interpretation of ...)" must be completed accordingly.

Since the deponent is an illiterate in Bahasa Malaysia, all the requirements under O. 25 r. 24 of the SCR 1980 must be complied with. The said O. 25 r. 24 provides:

> where it appears to the person administering the oath the deponent is illiterate or blind, he must certify in the jurat that:
>
> (a) the affidavit was read in his presence to the deponent;
>
> (b) the deponent seemed perfectly to understand it; and
>
> (c) the deponent made his signature or mark in his presence;
>
> and the affidavit shall not be used in evidence without such a certificate unless the Court is otherwise satisfied that it was read to and appeared to be perfectly understood by the deponent.

In the present case, I am convinced that all the three requirements under O. 25 r. 24 of the SCR 1980 have been complied with. The commissioner for oaths who administered the oath has certified that he has truly, distinctly and audibly read over the contents of the affidavit to the deponent; and explained the nature and effect of the exhibits therein referred to; and that the deponent seemed perfectly to understand the same; and the deponent made his mark thereto in his presence.

The only 'non-compliance' in the said jurat is that the last part which states "(Through the interpretation of ...)" was not properly filled in. Instead of writing his full name after the words "(Through the interpretation of ...)" the interpreter (who was also the same person as the commissioner for oaths) has put his rubber stamp bearing his full name and the words "(Jurubahasa Mahkamah Bersara (Tingkatan Tinggi)". Even though this does not fully comply with the format as in Form 71(c), it is not to be considered as fatal because there is still some indication to show that the contents of the affidavit have been interpreted to the deponent. In any event, what is more important in affirmation of affidavits, be it by way of Form 71(a), (b), (c) or (d), is that the person who administer the oaths ie, the commissioner for oaths, must be fully satisfied and certified that the deponent seemed perfectly to understand the affidavit, either through his own understandings or through the interpretation of an interpreter; and that the deponent made his signature or mark voluntarily in his presence. In the present case, the commissioner for oaths has made such certification in the jurat.

On the above justification, I am of the view that the so-called "non-compliance" with the SCR 1980 as raised by the respondents in their preliminary objection is not serious, and at most, can only be considered as a mere irregularity which can be cured and the said affidavit can be used in evidence under O. 25 r. 25 of the SCR 1980 to support the appellant's application. Order 2 r. 1 of the SCR 1980 also provides that such non-compliance shall only be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment or order therein. In the premise, I have no hesitation to over rule the respondents' preliminary objection and to accept the said affidavit to be used for the purpose of the appellant's application.

Rehearing Of the Appellant's Application

The appellant is also appealing against the decision of the learned magistrate for dismissing his application dated 12 April 2000 to set aside the writ of distress dated 1 March 2000 and the relevant order dated 29 February 2000. The main ground for the application is that there was no rent due or payable at the material times that entitled the respondents to apply for a writ of distress and as such all the consequential actions as a result of the issuance of the said writ of distress are invalid. The appellant is saying that he was not in arrears with his rent at the material times.

The said writ of distress dated 1 March 2000 was issued by the magistrate court upon an application made by the respondents under s. 5(1) of the Distress Act 1951 (Act 225), which provides:

> 5(1). A landlord or his agent duly authorised in writing may apply *ex parte* to a Judge or Registrar for an order for issue of a warrant, to be called a

> warrant of distress, for the recovery of rent due or payable to the landlord by a tenant of any premises for a period not exceeding twelve completed months of the tenancy immediately preceding the date of the application and the Judge or Registrar may make such order accordingly.

Under s. 2 of the same Act, the word 'judge' includes "a first class magistrate in all cases where proceedings are taken in a magistrate court". It must also be stressed here, that a writ of distress can only be issued under the said Act. The provisions of the relevant sections, particularly s. 5 of the Act must strictly be complied with before an order can be granted. Section 4 of the said Act clearly indicates that no landlord shall distrain for rent except in the manner provided by the Act. Section 5(1) of the Act clearly provides that a writ of distress can only be issued for the recovery of rent due or payable to the landlord by a tenant of any premises for a period not exceeding twelve completed months of tenancy immediately preceding the date of the application. In other words, there must be rent due or payable or in arrears at the time when the application was made for a writ of distress.

In the present case, the said premises originally was under the Control of Rent Act 1966 (Act 363). However, at the material times, the said Act 363 was repealed by the Control of Rent (Repeal) Act 1997 (Act 572), which came into force on 1 September 1997. Part of the relevant transactions in this case occurred during the 'transitional period', ie, the period commencing on 1 September 1997 and ending on 31 December 1999, as provided under s. 5 (1) of the Act 572.

The main issue here is whether, in the circumstances of the present case, there was rent due or payable or in arrears to the respondents (as the landlord) at the time when they applied for a writ of distress on 28 February 2000. In his affidavit dated 23 February 2000 in support of the said application (para. 3), the first respondent deposed:

> 3. Pihak Defendan adalah sebenarnya **terhutang** kepada Plaintif dengan jumlah wang sebanyak RM3,116.00 yang merupakan **tunggakan** sewa bagi premis No: 100, Jalan Loke Yew, 28700 Bentong, Pahang Darul Makmur **yang kena dibayar** untuk empat (4) bulan dari bulan November 1999 hingga Disember 1999 pada kadar RM58.00 sebulan dan Januari 2000 sehingga Februari 2000 pada kadar sebanyak RM1,500 setiap bulan.

My understanding of para. 3 of the said affidavit is that the four months rent was due (terhutang), payable (kena dibayar) and in arrears (tunggakan).

For the months of November 1999 and December 1999 (which were still within the 'transitional period') the monthly rent was still at RM58 per month. There is no dispute on this point The first time the appellant came to know that the said premises was sold to the respondents and all future rental was to be paid to the first respondent was when he received a letter dated

3 December 1999 from the first respondent. The said letter was originally sent to the appellant at the address of the said premises at No. 100, Jalan Loke Yew, 28700 Bentong, Pahang Darul Makmur and the original date based on the postal rubber stamp is 7 January 2000. However, from the notis benda berdaftar, (at p. 182 of the Appeal Records) the said letter was not served on the appellant at the above address when attempt was made on 12 January 2000. Apparently, the letter was 'de toured' to a new address at Tkt. 10, Blok 3, ISORA Apartment, Jalan Tun Razak, 50400 Kuala Lumpur. The second date based on the postal rubber stamps is 18 January 2000. Based on these dates, the court is convinced that the said letter only reached the appellant after 18 January 2000. The appellant has also denied having received both the earlier letters from the first respondent (dated 1 October 1999) and from Tui Tuck Mun (dated 13 October 1999). No proof of acknowledgment of receipt produced by the respondent.

For the months of November 1999 and December 1999 (before the appellant received the letter dated 3 December 1999 from the first respondent after 18 January 2000), the appellant had sent the rental for the two months to the previous owner, Tui Tuck Mun *vide* Money Order No: C576599 (for November 1999) on 2 November 1999 and Money Order No: C574330 (for December 1999) on 1 December 1999. (see: pp. 114-116 of the Appeal Records). At this point of time, the appellant had no knowledge about the change of ownership of the said premises as he had not received the two earlier letters sent by the first respondent and Tui Tuck Mun. As such, I am satisfied that the appellant was not in arrears as far as the rental for November 1999 and December 1999 is concerned. He has paid the rental at the beginning of each month. Thus the respondents cannot use this issue to apply for a writ of distress against the appellant.

In his affidavit in support of the application for a writ of distress (at para. 3), the respondents alleged that the appellant was in arrears (tunggakan) for rental for the months of November 1999 to February 2000. The meaning of the word 'arrears' was considered in a Canadian case: *Corbett v. Taylor* [1864] 23 UCR 454 CA. That case was dealing with a contract of requiring payment of monies. In that case, the court said:

> we take arrears to mean something which is behind in payment or which remains unpaid ... It implies a duty and a default.

In *Chong Fong Kwee v. Kong Gim Ham* [1959] MLJ 75, Rigby J has said that "rent is lawfully due as soon as the proper date for payment has arrived ... . Rent shall not be deemed to be in arrears if the tenant proves that it was tendered before such date."

Applying the above principle to the present case, I am satisfied that the rental for November 1999 and December 1999 was not due and not in arrears because the appellant had tendered the said rental to the previous owner of the premises, Tui Tuck Mun before being effectively informed about the new owners.

For the months of January 2000 and February 2000, it is not disputed that the 'transitional period' as provided under s. 5(1) of the Control of Rent (Repeal) Act 1997 (Act 572) has lapsed, after 31 December 1999. Upon the repeal of the Control of Rent Act 1966 (Act 363), any tenancy between a landlord and a tenant shall be deemed to have ceased. (see: Section 3, Act 572). The amount of rental to be paid monthly by the tenant to the landlord during the 'transitional period' shall be determined in accordance with the formula in the schedule. However, in the present case, both parties chose to stick to the original rental of RM58 per month until the end of the 'transitional period', on 31 December 1999. In other words, after 31 December 1999, the rate of rental for the said premises should be based on a fresh tenancy agreement between the parties. The premises is no more protected under the Control of Rent Act 1966 (Act 363). Being a fresh tenancy agreement, there must be elements of 'offer' and 'acceptance' as to the new rate of rental and other related issues.

In the present case, the first respondent had, through his letters to the appellant (dated 3 December 1999) requested the appellant to vacate the said premises on or before 31 December 1999. The letter further indicated that if the appellant wishes to continue the tenancy, he is advised to come to the first respondent's office to discuss the matter. The said letter dated 3 December 1999 is reproduced below:

Lim Chee Hoi,
No. 84, Tingkat 3,
Jalan Loke Yew,
28700 Bentong,
Pahang Darul Makmur.

Date: 3hb. December 1999

Wong Choon For
No. 100, Jalan Loke Yew,
28700 Bentong,
PAHANG DARUL MAKMUR.

Tuan/Puan,

Per: NOTIS UNTUK MENGOSONGKAN PREMIS NO. 100, JALAN LOKE YEW, 28700 BENTONG, PAHANG DARUL MAKMUR

Merujuk kepada perkara diatas dan keratan 'CONTROL ACT' yang dilampirkan bersama. Pihak tuan perlu mengosongkan premis tersebut sebelum atau pada 31/12/1999.

2. Sekiranya pihak tuan berminat untuk terus menyewa premis diatas, sila datang kepejabat saya untuk berbincang.

Sekian, harap maklum.

Yang benar,

.. sgd...

In his earlier letter to the appellant dated 1 October 1999 the first respondent has given the same indication. However, the appellant in his affidavit had denied having received this letter. The respondents had not given any answer or explanation about this matter in their affidavit in reply. It is trite law that in evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as on admission by him of the fact so asserted. (See: *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609). In that letter, the respondent has also indicated that if the appellant continue to occupy the said premises after 31 December 1999, the appellant is required to pay a rental of RM1,500 per month with effect from January 2000 until he delivers vacant possession to the respondents. That is the only occasion where the rental of RM1,500 was mentioned by the respondents. Even that, there is no indication that the matter was effectively communicated to the appellant. In his letter dated 3 December 1999 which was received by the appellant, the first respondent had not made any mention about the new rental of RM1,500 per month with effect from January 2000. The said letter dated 1 October 1999 is reproduced below:

Lim Chee Hoi
No. 84, Tingkat 3,
Jalan Loke Yew,
28700 Bentong
Pahang Darul Makmur.

Tarikh: 1hb October 1999

Wong Choon For
No. 100, Jalan Loke Yew,
28700 Bentong,
PAHANG DARUL MAKMUR.

Tuan/Puan,

Per: KENAIKAN SEWA RUMAH (KEDAI) MENGIKUT AKTA KAWALAN SEWA (PEMANSUHAN) 1997, NOTIS UNTUK MENGOSONGKAN PREMIS NO. 100, JALAN LOKE YEW, 28700 BENTONG, PAHANG DARUL MAKMUR

Merujuk kepada perkara diatas dan keratan 'CONTROL ACT' yang dilampirkan bersama.

2. Saya dengan ini ingin memberi notis kepada pihak tuan mengikut s. 11(1), 11(2), 11(3)(a) Akta Kawalan Sewa (pemansuhan) 1997 untuk mengosongkan premis tersebut pada atau sebelum 31/12/99. Sekiranya pihak tuan berminat untuk terus menyewa premis diatas, sila datang ke pejabat saya untuk berbincang. Jika pihak tuan terus menetap dibangunan itu selepas 31/12/99, maka pihak tuan dikehendaki membayar sewa bulanan sebanyak RM1,500.00 mulai January 2000 sehingga milikan kosong.

Sekian, harap maklum.

Yang benar,

Sgd

In the circumstances, it is obvious that the new rental of RM1,500 per month with effect from January 2000 was unilaterally fixed by the respondents (as the landlord). It was not even effectively communicated to the appellant. The appellant has no knowledge about it. Thus, the appellant has never agreed to the said new rental. In fact, the appellant has not been to the first respondent's office to discuss about the new rental as required by the first respondent *vide* his letter dated 3 December 1999 to the appellant. Therefore, I can safely conclude that there is no new tenancy agreement. In order to support a claim for such increased rental or to justify the distress therefor, the respondents must show the tenant (the appellant) has agreed to pay such increased rental or facts from which such assent on the part of the appellant might be inferred by the court.

In *Jenaboo & Anor v. Vytilingum* [1885] 4 KY 78, Wood J in dealing with the issue of increased rental to justify the issue of a writ of distress, has said:

> that there was no power in a landlord to increase his tenant's rent by a notice, and unless there was an agreement by the tenant to pay such increased rent, or there were such facts in the case, as by his conduct or otherwise, from which the court could infer an assent on his part, he could not be made liable therefor; that if a landlord considered he should get more rent and the tenant declined to pay it, the only remedy open to the landlord was, after giving the tenant a proper notice to quit, to sue him in action of ejectment; but he had no right to distrain for his increased rent. That to entitle a landlord to destrain there must be an agreement to pay rent, and that for a fixed and definite amount.

In that case, the distress was declared to be irregular and improper and was discharged on the ground that the rent at RM5 per month was not agreed to and the amount of the rent that should be paid per month was a matter in dispute between the landlord and the tenant.

In the present case, applying the principles established in *Jenaboo*'s case, I have no hesitation to conclude that the respondents' claim that the appellant was in arrears in respect of rental for January 2000 and February 2000 must fail. Therefore the respondents had not proved that the appellant's rental was in arrears for four months as alleged by the respondents. On that ground, there is no justification for the application and issuance of a writ of distress by the Magistrate Court Bentong. On this ground alone, the court is satisfied that the said writ of distress issued on 1 March 2000 was irregular and improper and must be set-aside.

The respondents' counsel relied heavily on the provisions of the Control of Rent (Repeal) Act 1997 (Act 572), particularly ss. 8 and 11 thereof, to authorise their application for a writ of distress. The counsel argued that s. 8 of the said Act empowers the respondents to apply for a writ of distress for non-payment or arrears in payment of rental of the said premises, after complying with the necessary procedures laid down in ss. 11(2) and 11(3) of the same Act. In fact, the earlier letter dated 1 October 1999 sent by the first respondent to the appellant (which was not received by the appellant) clearly stated that the said letter was a notice issued pursuance to s. 11(1), 11(2), 11(3)(a) of the said Act.

Section 8(1) and (2) of the said Act provides:

> 8(1). In the event of non-payment or arrears in payment of rental by the tenant during the transitional period, the landlord shall have the right to vacant possession of the premises from the tenant without payment of any compensation.
>
> (2). In exercising his right to vacant possession of premises under subsection (1), the landlord shall comply with the procedure laid down in subsections 11(2) and 11(3) for the recovery of vacant possession of premises.

Section 11(1), (2) and (3) of the said Act provides:

> 11. (1) Upon the expiry of the transitional period under subsection 5(1) or 5(2), as the case may be, all tenancies deemed to have been entered into between the landlords and tenants under subsection 6(1) shall cease to be in force and the landlords shall thereafter:
>
> (a) have the right to vacant possession of the premises from the tenants without payment of any compensation; and

(b) be entitled to any rental accrued and remaining unpaid from the tenants as at the date of the expiry of the transitional period.

(2). A landlord who wishes to exercise his right under paragraph (1)(a) shall serve on the tenant a notice to vacate the premises.

(3). The notice referred to in subsection (2):

(a) shall provide for a period of three months for the tenant to vacate the premises; and

(b) may be served on the tenant or anyone authorised to accept service on his behalf hereafter referred to as the 'person to be served':

i. by delivering it personally to the person to be served;

ii. by sending it by registered post addressed to the person to be served at the usual or last know place of residence of the person; or

iii. by affixing it on some conspicuous part of the premises to which it relates if the person to be served cannot be served personally or by registered post

With respect, I cannot agree with the submission of the respondents' counsel on this issue. In the first place, the landlord's right under s. 8 of the said Act only arises in the event of non-payment or arrears in payment of rental by the tenant during the transitional period ie, 1 September 1997 to 31 December 1999. It does not cover arrears of rental beyond that period. The landlord must prove that there was non-payment or arrears in payment of rental during the transitional period. In other words, in relation to the present case, it should only cover rental for the months of November 1999 and December 1999, but not for the months of January 2000, and February 2000. These two months are clearly beyond the transitional period, as prescribed under s. 5 of the said Act. As I have stated earlier, there was no non-payment or arrears in payment of rental by the appellant for the months of November 1999 and December 1999.

Secondly, the right conferred under s. 8 only refers to the right to vacant possession of the premises from the tenant (appellant) without payment of any compensation. It does not include the right for a writ of distress (as in the present case). One can easily appreciate that an action for vacant possession is totally different from an action for a writ of distress. For vacant possession, the tenant has to vacate the said premises and thereafter to hand over the said premises to the landlord. On the other hand, a writ of distress has no such effect. A writ of distress is addressed to the bailiff of the court directing him forthwith to destrain any movable property found on the premises named

therein or such part of the property as may be sufficient, when sold, to realise the amount of rent therein stated to be due to the applicant, together with such sum due to the applicant by way of costs and to the bailiff for his fees and expenses (see: s. 7 of the Distress Act 1951 (Act 255)). Therefore, the respondents are not entitled to use s. 8 as an authority to authorise the issuance of a writ of distress against the appellant in the present case.

Thirdly, in exercising his right under s. 8(1) of the said Act (Act 572), the landlord shall or must comply with the procedure laid down in ss. 11(2) and (3) of with the procedures laid down in s. 11(2) and (3) of the same Act. This is provided under s. 8(2). The right under s. 11(1) of the said Act only arises "upon the expiry of the transitional period" ie, after 31 December 1999, but not before. Again the right under s. 11(1) refers to the right to vacant possession of the premises from the tenant without payment of any compensation and to any rental accrued and remaining unpaid from the tenant as at the date of the expiry of the transitional period. In the present case, I have stated earlier that the appellant was not in arrears of rental for the months of November 1999 and December 1999, as claimed by the respondents. Also, the respondents were not claiming for vacant possession through their application in the magistrate court. Therefore, I am of the view that the right under s. 11(1) of the said Act is not applicable in the present case.

The respondents' counsel argued that the first respondent had served on the appellant a notice dated 1 October 1999 as required under s. 11(2) and (3) of the said Act. Again, I am of the view that the said notice only relate to a notice to vacate the premises, but not to apply for a writ of distress. The said notice, giving the tenant a period of three months to vacate the premises, shall only be sent to the tenant 'upon expiry of the transitional period' ie, after 31 December 1999, but not before. As required under s. 11(3), the said notice must be served on the tenant or any one authorised to accept service on his behalf either by delivering it personally to him; by sending it by registered post addressed to him at his usual or last known place of residence; or if the person to be served cannot be served personally or by registered post, by affixing it on some conspicuous part of the said premises.

In the present case, the said notice (dated 1 October 1999) was sent before the expiry of the transitional period. There is no prove that the notice was effectively served on the appellant or any of his authorised agent in accordance with the provisions of s. 11(3) of the Act. Therefore, the said notice is not appropriate and invalid.

In the present case, the appellant was occupying the said premises at the material times. However, due to his old age and sickness, the appellant has to go to Kuala Lumpur very often for treatment. Therefore the tenancy is

deemed continued even after the date of the repeal of the Control of Rent Act 1966 (Act 363) (see: Section 6(1) of Act 572). Section 6(2) of Act 572 also provides:

> Unless sooner terminated by mutual consent of the parties, a tenancy deemed to have been entered into under subsection (1) shall be in force until the expiry of the transitional period.

What the respondents should have done in the present circumstances of the case, is to exercise their right as the landlords to the said premises under s. 11 of Act 572, upon the expiry of the transitional period ie, after 31 December 1999, when the tenancy deemed to have been entered into under s. 6(1) of the said Act, ceases to have effect under s. 6(2). The respondents may serve a notice to quit, giving the appellant a period of three months to vacate the premises and upon the appellant's failure to vacate the premises as requested the respondents may sue for vacant possession and arrears of rental.

Conclusion

In the circumstances, based on the aforesaid grounds, I make an order in terms of the appellant's application dated 12 April 2000 whereby the earlier order of the learned magistrate Bentong made on 29 February 2000 and the writ of distress issued on 1 March 2000, be set aside. The respondents are to pay damages to the appellant as a result of the execution of the said writ of distress, to be assessed by the senior assistant registrar; as well as costs of this proceeding.